Suggested Best Practices for Trial Judges in Pro Se Litigation

Approved by Commissioin 9/12/06

General

1. When a litigant appears without an attorney, verify that the litigant understands that he or she is entitled to be represented by an attorney; give information on pro bono or lawyer referral resources. Explain that self-representation is difficult, you as judge cannot act as an advocate for either side, and the other party's attorney will not provide assistance or advice.
   - If an unrepresented litigant appears to be mentally disabled, take additional steps to involve counsel and other support services.
   - The difficulty of self-representation should be emphasized in cases that are particularly complex, cases where the stakes are very high, and jury cases.
   - Once it is clear a litigant does not intend to get an attorney, do not harp on pro se status or make negative comments that suggest prejudgment or disapproval.

2. Direct the litigant to the resources available for self-represented litigants.
   - Inform a self-represented litigant that he or she has the responsibility to become familiar with and attempt to comply with the rules of procedure.
   - Repeat information regarding resources at every stage in the process.

3. Be generous in granting extensions of time to self-represented litigants (and others) to prepare for a hearing, obtain counsel, or comply with other requirements as long as the litigant appears to be acting in good faith, making an effort, and giving notice to the other side.

4. Ensure that court interpreters are available for all court proceedings (including settlement discussions) involving self-represented litigants (and others) who have language barriers.

5. Give a basic introduction to courtroom protocol, for example, the importance of timeliness, checking in with the clerk (if that is necessary), who sits where, directing argument to you, not other parties or attorneys, rising when you enter, and other matters you consider important (attire, gum chewing, reading while court is in session, etc.).

6. Explain the prohibition on ex parte communications (you cannot talk to one side without the other side being present and litigants cannot file any papers with the court that are not served on the other side).

7. Actively manage and schedule cases involving self-represented litigants.

8. Insofar as possible, monitor counsel to ensure that a self-represented litigants is not being misled.

Pleadings

14. Construe pleadings liberally:

- Look behind the label of a document filed by a self-represented litigants and give effect to the substance, rather than the form or terminology.
- Do not ignore an obvious possible cause of action or defense suggested by the facts alleged in the pleadings even if the litigant does not expressly refer to that theory.
- Consider information in other documents filed by a self-represented litigant.
- Allow amendment freely.

15. Give a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect unless it is absolutely clear that no adequate amendment is possible.

16. Read all relevant materials and announce that you have done so before making a ruling.

17. Give the rationale for a decision either in writing or orally on the record.

18. When announcing a decision or entering an order, do not use legal jargon, abbreviations, acronyms, shorthand, or slang.

19. If possible, after each court appearance, provide all litigants with clear written notice of further hearings, referrals, or other obligations.

20. Ensure that all orders (for example, regarding discovery) clearly explain the possible consequences of failure to comply.

21. Follow the principle that cases should be disposed of on the merits, rather than with strict regard to technical rules of procedure.

22. Instruct a self-represented litigant how to accomplish a procedural action he or she is obviously attempting or direct them to resources that will provide such instructions.

- Do not tell a self-represented litigant which tactic to use, but explain how to accomplish the procedure he or she has chosen.

23. If a motion for summary judgment is filed, advise a self-represented litigant that he or she has the right to file counter-affidavits or other responsive material and that failure to respond might result in the entry of judgment against the litigant.

24. Decide all motions filed by a self-represented litigant without undue delay.

Settlement

25. At a pre-trial or status conference, bring up the possibility of settling the matter or referring it to mediation.

- Encourage, but do not try to coerce, settlement or mediation.

26. If the parties present you with an agreed order settling a case, engage in allocution to determine whether the self-represented litigant understands the agreement and entered into it voluntarily.

- Explain that if an agreement is approved, it becomes an order of the court with which both parties will be required to comply.
- Determine that any waiver of substantive rights is knowing and voluntary.

Pre-Hearing

27. Explain the process and ground rules (e.g., that you will hear from both sides, who goes first, everything said will be recorded, witnesses will be sworn in, witnesses may be cross examined, how to make an objection).

28. Explain the elements and the burden of proof.

29. Explain the kinds of evidence that can be presented and the kinds of evidence that cannot be considered.

- Explain that you will make your decision based only on the evidence presented.
- Encourage the parties to stipulate to uncontested facts and the admission of as much of the documentary evidence as possible.

30. Try to get all parties and counsel to agree to relax technical rules of procedure and evidence so that the hearing can proceed informally with an emphasis on both sides getting a chance to tell their story.

Hearing

31. Ensure that the notice of hearing unambiguously describes in a way a self-represented litigant can understand that a hearing on the merits is being scheduled and the litigant should be prepared with evidence and witnesses to present the case or defense.

32. Allow non-attorneys to sit at counsel table with either party to provide support but do not permit them to argue on behalf of a party or to question witnesses.

33. Before starting, ask both parties whether they understand the process and the procedures.

34. Call breaks where necessary if a litigant is becoming confused or tempers on either side are becoming frayed (or your patience is running low).

35. Question any witness for clarification when the facts are confused, undeveloped, or misleading.

- Explain at the beginning of a hearing that you will ask questions if necessary to make sure you understand the testimony and have the information you need to make a decision.

- Ask the same type of questions of witnesses called by a represented party if warranted.
- Take care that your language and tone when asking questions does not indicate your attitude towards the merits or the credibility of the witness.

36. Follow the rules of evidence that to go to reliability but use discretion and overrule objections on technical matters such as establishing a foundation for introducing documents and exhibits, qualifying an expert, and the form of questions or testimony.

- If you relax a rule for a self-represented party, relax it for a represented party as well.
- Require counsel to explain objections in detail.
- If counsel objects, ask if he or she is arguing that the evidence is unreliable.
- Explain rulings on evidence.

37. If necessary to prevent obvious injustice, allow a brief recess or adjourn for the day (or longer) to allow a self-represented litigant (or even a represented litigant) to obtain additional evidence or witnesses.

38. Do not allow counsel to bully or confuse self-represented litigants or their witnesses.

The Decision

39. Announce and explain your decision immediately from the bench with both parties present if possible unless the volatility of the proceedings suggests that a written decision would be preferable to prevent outbursts and attempts to re-argue the case.

40. If you decide to take a matter under advisement, inform the parties that you wish to consider their evidence and arguments and will issue a decision shortly.

- If possible, announce a date by which a decision will be reached.

41. Issue an order in plain English explaining the decision, addressing all material issues raised, resolving contested issues of fact, and announcing conclusions of law.

42. If asked about reconsideration or appeal, refer the litigant to resources for self-represented litigants on this topic.

43. If asked about enforcement of an order or collection of a judgment, refer the litigant to any resources for self-represented litigants on this topic.